The International Library of Essays in Law and Legal Theory

Schools

Natural Law, Vols I & II *John Finnis*
Justice *Thomas Morawetz*
Law and Economics, Vols I & II *Jules Coleman and Jeffrey Lange*
Critical Legal Studies *James Boyle*
Marxian Legal Theory *Csaba Varga*
Legal Reasoning, Vols I & II *Aulis Aarnio and Neil MacCormick*
Legal Positivism *Mario Jori*
American Legal Theory *Robert Summers*
Law and Language *Fred Schauer*
Sociological Theories of Law *Kahei Rokumoto*
Rights *Carlos Nino*
Law and Psychology *Marin Levine*
Feminist Legal Theory *Frances Olsen*

Areas

Criminal Law *Thomas Morawetz*
Tort Law *Ernest Weinrib*
Contract Law, Vols I & II *Larry Alexander*
Anti-Discrimination Law *Christopher McCrudden*
Consumer Law *Iain Ramsay*
International Law *Martti Koskenniemi*
Property Law *Elizabeth Mensch and Alan Freeman*
Constitutional Law *Mark Tushnet*
Procedure *Denis Galligan*
Evidence and Proof *William Twining and Alex Stein*
Administrative Law *Denis Galligan*
Child Law *Harry Krause*
Family Law, Vols I & II *Harry Krause*
Welfare Law *Peter Robson*
Medicine and the Law *Bernard Dickens*
Commercial Law *Ross Cranston*
Communications Law *David Goldberg*
Environmental Law *Michael Blumm*
Conflict of Laws *Richard Fentiman*
Law and Religion *Wojciech Sadurski*

Legal Cultures

Comparative Legal Cultures *Csaba Varga*
Law and Anthropology *Peter Sack*
Hindu Law and Legal Theory *Ved Nanda*
Islamic Law and Legal Theory *Ian Edge*
Chinese Law and Legal Theory *Michael Palmer*
Japanese Law and Legal Theory *Kiochiro Fujikura*
Law and Development *Anthony Carty*
Jewish Law and Legal Theory *Martin Golding*
Legal Education *Martin Levine*

Future Volumes

Human Rights Law, Socialist Law and Legal Theory, Sociology of Law, Labour Law, Common Law and Legal Theory, Civil Law and Legal Theory, Law and Society, African Law and Legal Theory, Soviet Law and Legal Theory and Cumulative index.

Justice

Edited by

Thomas Morawetz

School of Law
University of Connecticut

Dartmouth
Aldershot · Hong Kong · Singapore · Sydney

force to keep these institutions in place. That is, for reasons undoubtedly related to those that support the second part of Durkheim's first law of penal evolution, we take the amount of force a society uses against its own people as an inverse measure of its justness. And though no more than a rough measure, it is a revealing one nonetheless, because when a society is limited in the degree of force it can use against its subjects, it is likely to have to be a juster society since it will have to gain its subjects' cooperation by offering them fairer terms than it would have to, if it could use more force. From this we cannot simply conclude that reducing the force used by our society will automatically make our society more just—but I think we can conclude that it will have this tendency, since it will require us to find means other than force for encouraging compliance with our institutions, and this is likely to require us to make those institutions as fair to all as possible. Thus I hope that America will pose itself the challenge of winning its citizens' cooperation by justice rather than force, and that when future historians look back on the twentieth century, they will find us with countries like France and England and Sweden that have abolished the death penalty, rather than with those like South Africa and the Soviet Union and Iran that have retained it—with all that this suggests about the countries involved.

[16]

ALAN WERTHEIMER

The Equalization of Legal Resources

In the movie *The Verdict*, Frank Galvin (played by Paul Newman) is a has-been of a lawyer who wins a substantial malpractice settlement for his client against a hospital represented by a team of lawyers from a powerful law firm.[1] We are, of course, meant to be surprised by this turn of events. For as Damon Runyon once quipped, the race is not always to the swift nor the battle to the strong, but that's the way to bet. The question is this: why should the odds have been against Galvin's client in the first place? Why should we allow the use of radically unequal legal resources to make the difference between a meager recovery and an adequate award, between liability and a favorable verdict? At first glance, it would seem that we should not allow the resolution of legal controversies to be affected by these sorts of financial inequalities. I shall argue that this first glance is correct. More specifically, I shall argue for a principle which I shall call the "equalization of legal resources" (ELR) for civil law controversies that involve disputes between *individuals* (or organizations).[2]

I

The Importance of Legal Resources. I shall assume that the distribution of legal resources affects the outcomes of legal controversies. In other words, I shall assume that those who spend considerable sums on legal resources

I wish to thank Elizabeth Bussiere, Arthur Kuflik, Priscilla Machado, Ian Shapiro, George Sher, Robert Taylor, Michael Walzer, and the Editors of *Philosophy & Public Affairs* for their helpful comments. I also wish to thank David Luban for his bibliographic help.

1. *The Verdict*, Twentieth Century-Fox, 1982. I will ignore the various unethical practices in which both sides engaged—for example, Galvin's not consulting his client before refusing to accept the offer of a settlement.

2. I ignore civil law controversies in which the state is a party to the proceeding.

are not acting irrationally. Legal resources can affect legal outcomes in several ways. Those with more legal resources will often win at trial because the quality and quantity of legal assistance makes a difference to the persuasiveness of the case, be it through superior investigative work, specialization of legal talent, better law libraries, or simply because attorneys can devote more time to preparation.[3]

In addition to its effects at trial, the inequality of legal resources also affects the resolution of controversies settled out of court. A party may accept an inadequate settlement or succumb to a claim to which he has a valid legal defense because he fears that there is a significant chance that he would lose at trial or because his opponent can *exhaust* him. Moreover, the *prospect* of unequal legal resources may affect the resolution (or nonresolution) of controversies where litigation is never brought because one of the parties cannot afford the sort of legal assistance that holds any promise of success. Indeed, the focus on litigation may itself understate the problem. As Frank Michelman observes, relationships in a juridical society occur "against a backdrop of supposed, even if vaguely comprehended, legal rights, entitlements, and protections—all potentially realizable through litigation, but all meaningful also simply by virtue of their inchoate public recognition."[4] To the extent that this is so, inequalities in legal resources will undermine the general sense of security this jural backdrop is meant to provide.

Equalization of Legal Resources. I do not have a precise view as to how best to construe or implement ELR. I certainly do not intend ELR to be interpreted literally. Complete equalization will be impossible, if only because there will always be variation in legal skills that cannot be controlled. Moreover, some legal cases are more difficult to develop than others, and equality of *presentation* may sometimes be served by allowing one party to spend more than the other, particularly if it is possible to identify such cases in advance. In arguing for ELR, I mean to argue not for numerical equalization, but for *whatever* regulative principle would maximize the attainment of just results, knowing full well that it will be im-

3. See David Luban, "Political Legitimacy and the Right to Legal Services," *Business and Professional Ethics* 4 (1985): 43. Also see Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 (1974): 95, and Lois Forer, *Money and Justice* (New York: Norton, 1984).

4. Frank Michelman, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II," *Duke Law Journal* 1974 (1974): 536.

possible to "micromanage" things so as to guarantee a just result in every case, and that the specification of that regulative principle will require complex empirical investigation. One further point. ELR requires the equalization of legal resources between adversaries *within* a case, not between cases. It is entirely consistent with ELR that some cases of litigation can and should involve a higher level of legal resources than others.

Equalization and Universal Access. Because the principles that motivate the argument for ELR have much in common with those that motivate an argument for *universal access* to legal services, it will prove useful to compare the two ideas. Equalization is both more and less demanding than universal access. It is *more* demanding because it is possible to provide a litigant with minimal (or even substantial) legal services which are, under the circumstances, entirely inadequate. Unlike nutritional needs, where we have a noncomparative standard, the level of resources necessary to win a valid case depends upon the resources available to one's opponent.[5] Equalization is, on the other hand, *less* demanding than universal access because ELR can sometimes be achieved by restricting the legal resources available to the more favored party rather than expanding those available to the less favored. Unlike universal access, ELR need not always be implemented through the expenditure of funds for legal services.

Interestingly, although it is frequently argued that society has a responsibility to provide everyone with a minimal level of medical care, arguments for universal access to legal services are conspicuous by their absence. Although we do provide some legal resources through legal aid organizations, the view that citizens have a *right* to legal resources in ordinary civil legal controversies—torts, contracts, divorces, wills, and so on—is simply not a part of traditional political discourse.[6] Although the

5. I ignore nonadversarial contexts, such as the drafting of a will.

6. Actually, the situation is worse than that. Not only do we not recognize a right to universal access to legal services, our society has long required "litigation access fees" to pursue a case in court. Although the Supreme Court has ruled that states cannot require an access fee to secure a *divorce* (*Boddie* v. *Connecticut*, 401 U.S. 371 [1971]), the Court has upheld access fees in other legal contexts, such as obtaining old-age assistance (*Ortwein* v. *Schwab*, 410 U.S. 656 [1973]) or bankruptcy status (*U.S.* v. *Kras*, 409 U.S. 434 [1973]). The Court has reached this result by arguing, among other things, that citizens have a fundamental interest in their marital status that differs from their interest in other legal claims and that the state's monopoly of authority with respect to marital status is importantly different from its role in other contexts. An indigent potential plaintiff "must appeal to the interest at stake

Supreme Court has mandated the provision of legal counsel at state expense in a criminal proceeding[7] and has used the "due process" and "equal protection" clauses of the Fourteenth Amendment to guarantee access to legal services with respect to some legal matters that involve "state action," the Constitution has never been understood to guarantee universal access to legal services in private civil controversies.[8]

Although it is eminently plausible that the principles which underlie the case for ELR would support universal access as well, I shall not argue for universal access here. The present point is this. If, on the one hand, a case for both equalization *and* universal access *can* be made, then society will have not only a responsibility to provide "minimally competent legal help," but, in fact, an obligation to "level up," to provide access to "equal legal services."[9] On the other hand, even if an argument on behalf of universal access to legal services does *not* succeed, because (let us say) it is wrong to require some citizens to pay for the legal services required by others, we must still decide whether we are not required to "level down" in cases where both parties can afford legal representation.

II

In effect, the argument for ELR extends to the legal context the noncontroversial principle that competitions can be controlled so as to permit the use of some resources and exclude the use of others. It is a general feature of all competitive activities that the "rules of the game" prohibit the use of resources which are held to be inconsistent with the point of the activity

in a particular litigation, and not to a general interest in ability to litigate, in an effort to invoke constitutional protection against an exclusionary court-access fee" (Michelman, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I," *Duke Law Journal* 1973 [1973]: 1162).

7. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

8. It should be noted that in *Meltzer* v. *C. Buck LeCraw and Co.*, Justice Black, who dissented from the majority opinion in *Boddie*, argued that the Court's decision in *Boddie* "can safely rest on only one crucial foundation—that . . . no person can be denied access to [the civil courts] because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney" (402 U.S. 954 [1971], *cert. denied*).

9. I ignore the question whether the Constitution should be understood to guarantee universal access, ELR, or both. For further discussion, see Luban, "Political Legitimacy and the Right to Legal Services," p. 43. Also see Lester Brickman, "Of Arterial Passageways through the Legal Process: The Right of Universal Access to Courts and Lawyering Services," *New York University Law Review* 48 (1973): 595.

or which would allow the competition to be (overly) determined by factors regarded as arbitrary. (I ignore, for the moment, the fact that what counts as an arbitrary factor is itself often arbitrary.)

Consider boxing. Boxing competitions are controlled by weight. Heavyweights do not fight lightweights. There may be several reasons for this. From an external (market) perspective, this practice allows the boxing industry to produce more entertaining events than would otherwise be possible. From an internal perspective, it may be thought that boxing matches should be decided by superior ability (quickness, accuracy, courage) and superior training, but not, primarily, by the sheer size of the opponents.

Consider several other competitions. The rules of contract bridge allow partners to communicate information about their hands by using fifteen words. One is not permitted, as in poker, to communicate information (or disinformation) through one's pauses, the tone of one's voice, or one's facial expressions.[10] Those personal resources are not allowed. Many athletic events place limitations on the *technology* that the players can utilize: the rules of tennis limit the size and stringing of the racket; the rules of baseball limit the size and construction of the bat; the rules of automobile racing limit the size of the engines; and so forth.

Interestingly, many sports are governed by rules which are analogous to ELR, although the motivation of these rules may be quite different.[11] Virtually all college and professional team sports limit the numbers of players on a team. Indeed, in a rule even more closely analogous to ELR, the National Basketball Association places a "salary cap" on the aggregate salaries that a team may pay. And in an arguably more serious context, the Federal Election Campaign Act (FECA) of 1971 (as amended in 1974) imposed limitations on the amounts that individuals could *contribute* to political campaigns and that could be *spent* by candidates or organizations acting on their behalf.

There are two points that need to be made about these sorts of restrictions on competitive activities. First, restrictions can be more or less conventional, although even highly conventional restrictions serve to dem-

10. Indeed, at the highest level of tournament bridge, players are shielded from their partners by a screen. "Social bridge" may allow players to use resources that tournament bridge prohibits. I ignore the question whether social bridge is "really" bridge or some other game altogether.

11. I suspect that the motivation of these rules is often one of collective self-interest, that they solve an *n*-person prisoner's dilemma problem.

onstrate the range of cases in which restrictions are permissible. That boxing equalizes weight, but not training or age, reflects only one, apparently arbitrary, conception of the sorts of resources which can be utilized.[12] That automobile racing limits the size of the engines but not the financial resources a "racing team" can employ reflects one, but only one, conception of the sorts of resources that ought to be allowed. By contrast, it may be thought that the restrictions on campaign expenditures imposed by the FECA are not merely conventional, that they reflect something of intrinsic moral importance about the purpose of elections and the sorts of factors that should be allowed to significantly influence the results of an election. I do not regard the restrictions imposed by ELR as merely conventional.

Second, even if a restriction on the use of certain resources is prima facie legitimate or even desirable, it does not follow that the restriction is morally acceptable. For the restriction may violate other values thought to be important. We think it permissible to restrict team size or aggregate salaries, not only because such limitations serve a legitimate purpose, but also because we do not think that teams have a right to use unlimited financial resources. Our thinking could go the other way. In *Buckley* v. *Valeo*, the Supreme Court ruled that although the FECA's limitations on campaign *contributions* were constitutional, because they were intended to achieve the putatively legitimate goal of deterring corruption or bribery, the limitations on expenditures were *un*constitutional, because the "ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" does not serve to justify limiting the ability of candidates to express their points of view—"the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[13]

Now considered as an exercise in moral (as opposed to constitutional) theory, it is by no means clear that *Buckley* is correct. As David A.J. Richards suggests, it is arguable that the crucial question is not whether limitations on campaign expenditures frustrate a "blankly aggregate conception of the aims of free speech," but whether such limitations frustrate the purposes of allowing such expression in the first place.[14] And that would

12. I wish to thank the Editors of *Philosophy & Public Affairs* for pressing me on this point.

13. *Buckley* v. *Valeo*, 424 U.S. 1 (1976), at 48–49.

14. David A.J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986), p. 216. I do not mean to suggest that *Buckley* is uncontroversial as an exercise in constitutional reasoning or that moral considerations have no constitutional import. See also Ian Shapiro, "Richard Posner's Praxis," *Ohio State Law Journal* 48 (1987), for further discussion of *Buckley*.

depend on one's theory of freedom of speech. But even if the Court's argument against restrictions on the use of financial resources is correct as applied to political speech, the question remains whether that sort of claim would have anything like the same force with respect to legal resources. I shall argue below that it does not.

III

The Goal of Adjudication. If competitions can legitimately be controlled so as to exclude the use of resources inconsistent with the point of the activity, what is the primary goal of adjudication? The answer is simple. The primary goal of the adjudicative process is to provide just resolutions. In Rawlsian terms, adjudication is a case of "imperfect procedural justice." Unlike instances of "perfect procedural justice," there is no procedure that guarantees a just result; unlike instances of "pure procedural justice," there is an *independent* criterion of a just result—the party that should win is the party that deserves to win.[15] The latter point is crucial. Whatever terms we use to describe this independent criterion, it is coherent to say that a civil controversy has been settled on its *merits*, that there is a *just* or *accurate* resolution to a civil dispute, that one party or the other has a *right* to win the case or has a right to a settlement of (roughly) a certain size.[16] In slightly different terms, *impartiality* is not sufficient. An adjudicative process that yielded frequent, albeit unbiased, incorrect decisions would be no more acceptable than an unbiased but incompetent umpire.

The Adversary System and Just Results. There are, in principle, a variety of adjudicative mechanisms which could be used to generate just re-

15. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 85. As Lon Fuller puts it, "when we say that party . . . voting in an election, has no 'right' to any particular outcome, we are describing the same fundamental fact that we allude to when we say that adjudication has to meet a test of rationality or of 'principle' that is not applied to . . . elections" ("The Forms and Limits of Adjudication," *Harvard Law Review* 92 [1978]: 370).

16. I do not claim that all cases, including those which turn on complex questions of law or fact, have a unique right answer. Moreover, to say that there is a "right answer" to a legal controversy does not resolve the question of whether the deserving party has a deeper *moral right* to win. It may be that the person who should win a legal case on the existing legal rules should not prevail on some alternative and preferable set of legal rules.

sults, mechanisms which vary in their formality and adversariness. The *adversary* system, which we use for the adjudication of civil controversies, has three principal characteristics: (1) an impartial tribunal of defined jurisdiction, (2) formal procedural rules, and (3) assignment to the parties of the responsibility to present their own cases and challenge their opponents.[17]

It is, of course, the third characteristic with which we are principally concerned. For whatever might be said on behalf of the first two characteristics (and these characteristics are not unique to the *adversary* system), the adversary system permits, nay requires, a lawyer to zealously represent his client's interests and maintain the confidentiality of his communications with his client, even if doing so is likely to yield an unjust result or conceal relevant information from the court.[18] And this, it may be thought, is likely to impede the attainment of just results rather than facilitate it.

The argument on behalf of the adversary system is, of course, that while neither side aims directly at justice and truth, an invisible hand will see to it that justice and truth result from the combat between them. Lon Fuller, for example, argues that adversary presentations have the unique ability to combat the "natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known," and particularly so "when we take into account the preparations that must precede the hearing."[19] When we view the adversary process in this light, "the role of the lawyer as a partisan advocate appears not as a regrettable necessity . . . but an expression of human insight in the design of a social framework within which men's capacity for impartial judgment can attain its fullest realization."[20]

Let us assume that the adversary system is the best (or at least a satisfactory) mechanism for generating just results. After all, no adjudicative process is perfect, and even if full advocacy may yield an unjust result *in a given case*, it is entirely possible that it will produce more accurate results than other adjudicative processes *in the long run*. Yet once the argument for the adversary system is put in these terms, it seems reasonable to suppose that the equalization of legal resources (broadly construed) will result in a higher probability of just results than the present laissez-faire system, or that just (pretrial) resolutions will occur more often because the parties know that litigation would be restricted by ELR. The adversary system already includes procedures, such as the rules of evidence, which are designed "to bring about just and informed decisions" by permitting "the inclusion of relevant evidence and argument and the exclusion of all other considerations."[21] It is arguably inconsistent and self-defeating to allow the use of grossly unequal legal resources to bring similarly irrelevant factors back into play. We could put the point slightly differently. The *parties* to a legal controversy may have radically unequal abilities to understand legal matters and to present their cases. For that reason, the use of partisan advocates may serve to promote just results precisely because it has an equalizing effect. ELR carries that effect one step further.

17. See David Luban, "The Adversary System Excuse," in *The Good Lawyer*, ed. David Luban (Totowa, N.J.: Rowman and Allanheld, 1984), p. 90.

18. Although a lawyer cannot hide information in discovery, some information is protected by lawyer-client confidentiality, and a lawyer is not required to bring to the attention of the other side information which might be useful to it.

19. Fuller, "The Forms and Limits of Adjudication," p. 383.

20. Ibid., p. 384.

Now to say that the principal goal of the adversary process is to provide just results is not to say that the maximization of just results should be unconstrained by other values. We might reject adjudicative processes which yield a higher probability of just results because they compromise other values internal or external to the adversary system.[22] Thus even if ELR would improve the *accuracy* of the adjudicative process, the question would remain whether ELR compromises such values and, if so, in what way.

Civil Justice and Criminal Justice. To probe this question further, let us compare the moral force of *wrong* decisions in the civil and criminal law. A criminal case is brought by the state against the defendant. If a defendant loses a criminal case, he may be punished. An ordinary civil case is brought by one individual (or organization) against another individual (or organization). If a defendant loses, he may have to pay compensation to the plaintiff.

A crucial part of our general view of adjudication in criminal cases is that we regard the conviction of the innocent in a criminal case as a *greater* injustice than the acquittal of the guilty—"better that ten guilty

21. The American Bar Association's Code of Professional Responsibility as adopted in 1969. The quotation is from Ethical Consideration 7-24, reprinted in Monroe Freedman, *Lawyer's Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975), p. 214.

22. Although I shall not pursue the issue here, we might reject a more accurate adjudicative process on the grounds that it is too expensive.

persons go free than that one innocent person is punished." Consider, by contrast, a civil case. If plaintiff (P) wins a case he should lose, then defendant (D) unjustly pays the plaintiff. Every dollar that P unjustly wins comes out of D's pocket.[23] And that is obviously wrong. But if D wins a case that he should lose (if, for example, the hospital had won the case portrayed in *The Verdict*), then every dollar which should be in P's pocket remains with D. And that seems to be just as wrong.

The contrast between the moral force of wrong decisions in the criminal law and that of wrong decisions in the civil law is reflected in their respective decision rules. Because injustice is asymmetrical in the criminal law, we err on the side of nonconviction. We require the state to prove its case "beyond a reasonable doubt." In the civil law, however, a party must typically prove its case with only a "preponderance of the evidence," reflecting the principle that it is just as wrong to find against a plaintiff who should win (or for a defendant who should lose) as it is to find for a plaintiff who should lose.[24]

Now it might be thought that even in the civil context, it is particularly important that we not unjustly find against a defendant who has been brought into court against his will—that here, too, a heavy burden of proof should lie with the plaintiff.[25] But that would be a mistake. Whether one is plaintiff or defendant in a civil case is likely to be "a result of . . . tactics or mere happenstance" and is completely irrelevant to the moral status of one's position.[26] Consider a case in which P and D enter into a contract, where D agrees to pay P for services rendered. P delivers the services, but D refuses to pay. If P sues D for breach of contract, P is certainly not the "aggressor" in any relevant sense. P's right to win should certainly not be compromised by the fact that it is he who must bring the case.

The contrast between criminal justice and civil justice strengthens the argument for ELR. In response to the oft made claim that zealous advocacy results in the acquittal of criminal defendants who are actually guilty, the standard and perfectly respectable answer is that the adversary system and other legal rights are not only designed to provide just results, but

23. I ignore the role of insurance.

24. It should be noted that there are various standards in various states.

25. For that reason, some have argued that the case for providing access to legal resources for indigent civil defendants is more compelling than the case for providing access to legal resources for indigent (potential) civil plaintiffs. See Michelman, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I," p. 1158.

26. Ibid., p. 1184.

serve to protect other values as well. Just as the Fourth Amendment limitations on search and seizure and the Fifth Amendment prohibition against compulsory self-incrimination are justified not on the grounds that these limitations are the best way of getting to the *truth* but on the grounds that they protect individual rights, it is argued that zealous advocacy is designed to afford maximum protection to possibly innocent defendants, to protect the privacy of innocent citizens, and to safeguard "individual liberty against the encroachment of the state."[27]

But if those are the reasons we are concerned to provide for zealous advocacy in the criminal law, they have but limited relevance to ordinary civil controversies. Although the concern for privacy will continue to exert some moral pull, we have no reason to protect the rights of the accused in a civil case, because there is no accused whose rights must be protected. And we have no reason to limit the power of the state in order to safeguard individual liberty because the state is not a party to the proceeding. The point could be put this way. It is one thing to argue that each individual has "a right to the best defense that money can buy" when he is up against the state. It is quite another to argue that each person has a right to the best legal representation that money can buy when winning unjustly would deprive another citizen of that to which he has a right.

IV

I suggest that if ELR (broadly understood) would promote a higher probability of just results than its laissez-faire alternative, then we have established a prima facie case for ELR. The case for ELR is reinforced, moreover, when it is considered in a broader theoretical context, for it is arguably required both by the general aims of government and by defensible principles of justice. To see this more clearly, recall the comparison between the distribution of medical care, which has been much discussed by contemporary political philosophers, and the distribution of legal resources, which has been virtually ignored. For two principal reasons, this lack of attention to the distribution of legal resources is somewhat puzzling.

First, even if the provision of medical care is an important responsibility of a liberal state, the provision of such care is arguably not among the *fun-*

27. Luban, "The Adversary System Excuse," p. 91. Also see Alan Goldman, *The Moral Foundations of Professional Ethics* (Totowa, N.J.: Rowman and Littlefield, 1980), p. 117.

damental reasons for having a state. On the other hand, if the Lockean story about the origins of government is part of the moral truth about the state, we establish civil government because "self-love will make men partial to themselves and their friends,"[28] because "it is unreasonable for men to be judges in their own cases."[29] Whereas medical services are available in the private sector and medical self-help is both allowed and encouraged, a major purpose of the state is to monopolize binding resolutions to certain sorts of controversies. And if providing a locus for the impartial and accurate adjudication of civil disputes (or their prelegal analogues) is among the important purposes of the state, then the adequacy of its procedures for achieving this purpose should be among the more important criteria of a just state.

The relative inattention to the *distribution* of legal resources is puzzling for a second reason. Although there may be good reasons to support a doctrine of universal access to medical care, the argument for *equalization* of medical care is problematic at best. As Charles Fried suggests, "There is something irrational about a system which might forbid individual physicians to render a service, not because it is harmful, but because its benefits are not available to all."[30] Of course, given that medical resources are both scarce and fungible, the devotion of resources to one person does subtract from the resources available to another. Yet there is still an obvious difference between the legal and the medical area. Although the distribution of medical resources may be somewhat competitive, it is not directly *adversarial*. By contrast, an improvement in the legal resources available to one party has a direct negative effect on the interests of another. For these reasons, the *distribution* of legal resources—as opposed to their absolute level—is arguably more important than the distribution of medical resources and represents an important problem for a theory of distributive justice.

It is a problem of distributive justice of a special sort. The problematic of this article belongs to what Rawls calls "partial compliance theory."[31] Whereas "strict compliance theory" provides the criteria of a just society,

28. John Locke, *Second Treatise of Government*, sec. 13.
29. Ibid.
30. Charles Fried, "An Analysis of 'Equality' and 'Rights' in Medical Care," in *Implications of Guaranteeing Medical Care*, ed. J. P. Perpich (Washington, D.C.: National Academy of Sciences, Institute of Medicine, 1976), pp. 3–14.
31. Rawls, *A Theory of Justice*, p. 8.

partial compliance theory provides the moral criteria for dealing with *injustice*. Actually, we can identify two different sorts of partial compliance theory. One purpose of what I shall call *substantive* partial compliance theory is to provide a theory of compensation, one which will identify the sorts of harms which merit compensation, the persons who should provide the compensation, and the sort of compensation that should be made. What I shall call *procedural* partial compliance theory provides criteria for the mechanisms we should use to resolve claims that there have been deviations from strict compliance principles and to implement the principles of substantive partial compliance theory.

I suspect that the relative lack of attention to the distribution of legal resources reflects a general tendency of contemporary political philosophers to focus on *strict* compliance theory as opposed to partial compliance theory, even though, as Rawls acknowledges, "the problems of *partial* compliance theory are the *pressing and urgent matters* . . . the things that we are faced with in everyday life."[32] This is not a criticism. The emphasis on strict compliance theory may be quite sound as a philosophical strategy. For it is possible, as Rawls suggests, that strict compliance theory provides "the only basis for the systematic grasp of these more pressing problems"—that we must, as it were, start at the beginning.[33]

But whatever the rationale for this asymmetry of focus, the fact remains that contemporary theories of justice have almost nothing to say about procedural partial compliance theory, particularly as it applies to adjudication in the civil law. Beyond observing that a just legal system must guarantee "rational procedures of inquiry" and that judges "must be independent and impartial," Rawls is virtually silent about adjudication.[34] Although Robert Nozick discusses substantive principles of compensation in some detail, and although the principle of "rectification" is an explicit part of his entitlement theory of distributive justice, he says nothing about the way in which inequalities of resources might compromise procedures for resolving questions of compensation and rectification.[35]

32. Ibid., pp. 8–9 (emphasis added).
33. Ibid., p. 9.
34. To see what Rawls might say about such matters, consult his discussion of the "fair value" of political liberties, in ibid., pp. 224–27. I suspect that Rawls would be sympathetic to ELR.
35. Nozick develops the principle of compensation in chap. 4 of *Anarchy, State, and Utopia* (New York: Basic Books, 1974). He discusses punishment in chap. 6, and the principle of rectification in chap. 7.

316 *Philosophy & Public Affairs*

Michael Walzer's *Spheres of Justice* provides more theoretical help, albeit only implicitly.[36] According to Walzer's theory of "complex equality," social goods (for example, money, medical care, office, and education) can be distributed justly but unequally if (1) each social good is distributed for the right reasons (medical care should be distributed on the basis of medical need, "office" should be distributed on the basis of ability), and (2) the possession of one social good does not allow one to gain other social goods with which it has no intrinsic connection. Unequal amounts of money are permissible if one gains one's money by permissible means (for example, by working long hours selling blintzes to strangers) and one's money does not exert undue influence outside its appropriate sphere, namely, the sphere of commodities. In particular, there is, says Walzer, an important set of "blocked exchanges," a set of goods and services which are located outside the sphere of money, things which money should not be able to buy—human beings, exemption from military service, political power, and criminal justice.[37] Criminal justice should not be for sale. And to say that criminal justice is not for sale is not only to say that judges and juries cannot be bribed, it is to say (with respect to *universal access*) that the services of defense attorneys must be a matter of "communal provision,"[38] and (with respect to *equalization*) that they must be "provided equally for all accused citizens without regard to their wealth."[39]

Although Walzer says nothing about adjudication in the civil law, it is clear that the principle of blocked exchanges would apply there as well.[40] Moreover, if, as Walzer maintains, a theory of justice should elaborate on and extend to a society's practices those principles to which the society is already implicitly committed, then given that we already demand procedural fairness *within* the court system, it is not a radical step to say that we should be similarly committed to fairness in the distribution of legal resources. In any case, we do not have to accept the entire corpus of Walzer's theory to believe that adjudication should not be for sale, and that if it is not to be for sale, then we must adopt something like ELR.

36. Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983).
37. Ibid., pp. 100–103.
38. Ibid., p. 100.
39. Ibid., p. 85.
40. In personal communication, Walzer has indicated that although the notion of blocked exchanges should be extended to the civil law, he is not sure just what sorts of limits he would want to put on the purchase of legal resources.

317 *The Equalization of Legal Resources*

V

I now consider several objections to ELR.

ELR and Full Advocacy. It might be argued that ELR represents an important deviation from the principle of full (or zealous) advocacy—a principle which has become a cornerstone of the adversary system. Now in one sense, ELR does not deviate from the principle of full advocacy, for ELR does not alter the structure of an attorney's rights and responsibilities or the confidentiality of lawyer-client communication.[41] So that complaint can be put aside.

In another sense, however, ELR does deviate from full advocacy if full advocacy is understood to include the right to mobilize unlimited legal resources. But is it an unjustified deviation? Here I want to make two general points. First, *any* adjudicative process must be justified in terms of its propensity to produce just results and protect other values. We do not structure an adjudicative process so as to give effect to preexisting *procedural* rights (for example, the right to cross-examine witnesses or have one's attorney engage in pretrial discovery) regardless of their consequences. Rather, parties are given a package of procedural rights because those rights promote the justified goals of the process. If this is roughly correct, it is irrelevant that ELR deviates from the adversary system as we know it. It must be shown that it represents a greater deviation from the values which justify that system than its laissez-faire alternative, and that has not been shown.

The second point is this. If we consider the values which justify the adversary system, it is highly doubtful that ELR represents a greater deviation from those values than its laissez-faire alternative. I suspect that (just results aside) we value the adversary system primarily because it protects individual privacy and respects what we take to be an individual's right to give special weight to his own interests. Clearly, the value of privacy is not touched by ELR. And although ELR does compromise the *extent* to which one can use legal resources to pursue one's own interests, as I noted above, it does not require that one's attorney adopt a less partial point of view. The fact is that the basic structure of the adversary system is compatible with various specific rules or procedures, many of which have

41. See Charles Fried's analysis of the lawyer as "friend" in *Right and Wrong* (Cambridge: Harvard University Press, 1978), pp. 179–81.

undergone considerable change. Although a lawyer was once expected to keep the essential facts about his case hidden from the other side, a lawyer may now be asked to reveal virtually everything about his case prior to trial.[42] Yet we still have an adversary system, and one which is arguably more consistent with its underlying values. In my view, ELR would have a similar effect.

ELR, Autonomy, and Freedom. Now it might be argued that even if ELR is compatible with values *internal* to the adversary system, it still represents a serious infringement of values *external* to that system. In particular, it might be argued that it violates important individual rights or freedoms. To see how this objection might go, consider James Fishkin's argument that genuine equality of opportunity is incompatible with the autonomy of the family.[43] Fishkin's point is this: if, on the one hand, parents are free to raise their children by their own lights, then some children will be more likely to succeed than others; if, on the other hand, we attempt to ensure that no children will have social advantages over others, then we must infringe on the autonomy of the family. And, Fishkin explicitly maintains, similar things can be said for legal representation.[44]

Fishkin is certainly right to observe that insulating the legal process from background inequalities would require restrictions "on the freedom of the non-poor to contract for better services."[45] But the question is not whether ELR would restrict the freedom of clients to mobilize legal resources—for that is precisely its point—but whether those restrictions would constitute an *impermissible* constraint on freedom. After all, even if the equalization of background conditions would constitute an unjustifiable infringement on *family* autonomy, it does not follow that this argument can be successfully extended to the legal context.

Consider first the notion of autonomy. Respect for individual autonomy may require that one be given some latitude to give special weight to one's own interests and that one be permitted to be represented by an attorney

42. See Richard Wasserstrom, "Roles and Morality," in *The Good Lawyer*, ed. Luban, p. 36.

43. James Fishkin, *Justice, Equal Opportunity, and the Family* (New Haven: Yale University Press, 1983).

44. "While the Legal Services Corporation and Medicaid exemplify the recent progress we have made in leveling up efforts for the poor on both fields . . . such efforts could never aspire to full equalization—unless they were accompanied by systematic restrictions on the freedom of the non-poor to contract for better services" (ibid., pp. 167–68).

45. Ibid.

of one's own choice. But, as I have argued, *that* sort of autonomy is not violated by ELR. Moreover, not all forms of autonomous action are of equal moral value or deserve equal moral protection. For not only is it arguable that the moral value of parental autonomy is greater than the moral value of "litigant autonomy," but allowing a parent to provide special opportunities for his child does not deprive another child of something to which he has a specific right (as distinguished from a general right to equality of opportunity). By contrast, allowing a litigant to mobilize *extraordinary* legal resources may well deprive the other side of the legal result to which it is specifically entitled.

Considerations of autonomy aside, it might be argued that ELR represents an unjustified restriction of freedom of expression. Recall the analogy between ELR and limitations on campaign expenditures, an analogy also used by Fishkin to argue against principles such as ELR. There are three points that we can make here. First, for reasons noted above, the Supreme Court's view on limitations on campaign expenditures may have been wrong. Second, the Court's position on campaign expenditures assumes that campaign expenditures are a form of political speech, and thus should receive special protection under the First Amendment. But even if the Court is right in claiming that campaign expenditures are a form of political *speech* (and this is not clear), it does not follow that expenditures on legal resources should also be understood as a form of speech. If not, then the argument from free speech simply does not apply.

Third, if both expenditures on campaigns and expenditures on legal resources can be legitimately understood as forms of speech, it does not follow that they merit comparable protection. If campaign expenditures are a form of expression, they are a form of *political* expression. And politics is not law. Whatever the best theory of the freedom of political expression, we do not justify that freedom because it contributes to an independent just result. Political contests are not instances of imperfect procedural justice. But as we have seen, legal controversies are different. Just as commercial speech may be subject to restrictions that would be inappropriate with respect to literature, we already place *severe* limitations on what a client can (legitimately) ask his attorney to do and *say* on his behalf—limitations that go far beyond what would be permissible in the political context. I do not see that the restrictions imposed by ELR are fundamentally different.

Issues of free speech aside, we could consider the claim that ELR would

violate individual freedom from a (Nozickian) libertarian perspective. On this view, ELR might violate a general right to use one's justly acquired holdings in whatever way one wishes—if the use of those resources does not violate the rights of another. But herein lies the problem. Much of the civil law is specifically designed to compensate people for harms or to rectify injustices in the distribution of holdings. Unlike the basic distribution of holdings, which is an example of "pure procedural justice," adjudication in the civil law is an example of a "patterned principle" of justice.[46] We want courts to distribute (or redistribute) holdings according to the patterned principle "to each according to his legal deserts (or rights or entitlements)."

Consider Wilt Chamberlain.[47] Assume that Wilt has been earning $250,000 a year in accordance with the principles of justice in acquisition and justice in transfer. His basic holdings are just. Now suppose that (1) Walt contracts to build a home for Wilt; (2) Walt builds the home according to the terms of the contract; (3) Wilt does not live up to the terms of the agreement; and (4) Walt sues Wilt for breach of contract. Suppose, further, that if Wilt is permitted to use his wealth to purchase legal resources, there is a good chance that Walt will be denied the legal result to which he is (*ex hypothesi*) entitled. Under these conditions, even a libertarian could argue that justly acquired holdings should not be permitted to prevent the minimal state from providing the decisions that are *required* by justice in compensation or rectification.

Indeed, the situation may be worse than that. For suppose that the controversy between Walt and Wilt turns on whether Wilt's holdings have, in fact, been justly acquired according to the principles of justice in acquisition and justice in transfer. Even a libertarian might hesitate to allow Wilt to use the resources that are in his *possession* to secure a finding that he is *entitled* to what he possesses when it is his entitlement to those resources that is at issue.

A libertarian might have a stronger case against *universal access* than against ELR. A libertarian could argue that even if the failure to provide P with sufficient legal resources to press his case against D would result in an injustice to P, the provision of those resources at public expense would deprive others of resources to which *they* are entitled. Moreover, even if

46. See Nozick, *Anarchy, State, and Utopia*, chap. 7. I ignore the various provisos that affect the principles of justice in acquisition and justice in transfer.

47. Cf. ibid., pp. 161–64.

the failure to provide universal access would *result* in erroneous decisions by the state, it could be argued that the *state* itself commits no injustice if it renders an impartial judgment on the basis of the (unequal) cases that it hears.[48]

Now the argument that the state has no obligation to provide access to legal services is at least somewhat problematic on its own libertarian terms. If, on the "natural right" or "social contract" view of the state, litigation can be regarded as a state-imposed substitute for the troublesome right of self-help which would prevail in the state of nature, then one who cannot defend his legal position for want of an attorney "is a person whose rightful liberty, as the state itself has seen fit to define that liberty, has been violated."[49] For this reason, it could be said that the *state* itself deprives people of due process or equal protection of the law when it fails to provide them with legal resources. Of course, even if a Nozickian attack upon universal access cannot be defeated on its *own* terms, it will still be vulnerable to the other arguments that can be advanced against libertarianism or in defense of redistributive policies.

In any case, I am concerned not with universal access, but with ELR. And even if a Nozickian argument against *universal access* can be sustained, it will *not* undermine the argument for ELR in those cases where state expenditures for legal resources are not required. It is one thing to say that bystander X is under no obligation to help P (justly) win his case against D and quite another to say that *D* should not be prohibited from unjustly winning his case against P.

Administrative Objections. If ELR can be defended against the previous sort of "principled" objections, we will still no doubt encounter serious administrative difficulties in the way of its implementation. It could be argued, for example, that like universal access, ELR would lead to a massive increase in litigation, in a society which is already supposedly plagued with excessive litigiousness. Suppose that it would. I would make but two points here. First, and most important, if an increase in litigation is the price we must pay for securing justice, we might say (within limits)—so

48. Certainly the *state* does not violate one's rights when it fails to do *everything* that it might do to protect those rights from being violated by others. This is true with respect to providing security from criminal attack, and it is true with respect to the attainment of civil justice as well. See Fried, *Right and Wrong*, p. 111.

49. Michelman, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I," p. 1194.

be it. In arguing against the FECA's restrictions on campaign expenditures, Chief Justice Burger observed that "there are many prices we pay for the freedoms secured by the First Amendment; the risk of undue influence is one of them."[50] It could also be argued that there are many prices we pay for justice, and that the risk of excessive litigation is one of them.

Second, even from a utilitarian or social welfare perspective, the *net* cost of litigation may be less than is often supposed. Although it is true that the process of adjudication involves losses to the litigants (apart from the value of any settlement), there may be compensating gains to society. It is, after all, the devotees of the economic analysis of law who maintain that litigation can be usefully understood as a process for constraining citizens "to the performance of duties and obligations imposed with a view to social welfare."[51] From this perspective, an increase in the ability of financially inferior parties to "vindicate their legal rights would effect a saving in the social costs of violations thereby deterred, a result which would to some extent offset any increases in total outlays on litigation and related activities."[52]

The problem of litigation aside, ELR might present other important difficulties of implementation and administration. As I noted above, equality of *presentation* may sometimes require inequality of financial resources, and it may be both important and extremely difficult to identify such cases in advance. In addition, ELR would generate significant problems of enforcement. It is relatively easy to determine whether boxers are overweight, whether a team has too many players, or whether a tennis player is using a nonstandard racket (policing baseball bats is more difficult). It will not be similarly easy to assure that each side uses no more legal resources than it is entitled to use.

I do not know whether these sorts of administrative difficulties could be overcome. They are not trivial problems, and it may well turn out that the game is not worth the candle. If the argument of this article is roughly correct, it is precisely those administrative problems which we should now consider.

50. *Buckley* v. *Valeo*, 424 U.S. 1 (1976), at 256–57.

51. Michelman, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I," p. 1175.

52. Michelman makes this point with respect to universal access in ibid., p. 1168.

Name Index